KANNAMAL SUNDARAJAH

v.

PAUDIR HASSAN PTE. 651359

HIGH COURT MALAYA, SEREMBAN
PEH SWEE CHIN J
[CIVIL SUIT NO. PF 176 OF 1984]
25 JUNE 1985

CIVIL PROCEDURE: *Running-down claim - Application by defendant to strike out claim on ground that defendant was a servant of Government of Malaysia and hence should be labelled such - Whether application should be allowed - Whether defendant should have pleaded limitation in defence.*

This was a running-down claim brought by the plaintiff as administratrix of the estate of one Latchman a/l Sandrial, deceased, against the defendant who was a soldier in the army. By summons-in-chambers the defendant applied to strike out the claim on the ground that the defendant was a servant and/or agent of the Government of Malaysia, the registered owner of the Land Rover which was involved in an accident with the deceased and hence should have been labelled as such. The defendant insisted on doing this as it would mean that the plaintiff's claim would be barred under s. 2 of the Public Authorities Protection Act 1948.

The plaintiff objected against the application stating that she had no knowledge that the defendant was a servant and/or agent and further that such allegation was irrelevant as the plaintiff's claim was not based on such allegation. The plaintiff also raised a preliminary point that the defendant should have pleaded the point of limitation in his defence which he had not so done.

Held:

[1] Whether the defendant was acting in the course of employment as a servant of government of Malaysia or whether he was acting in the within the scope of his authority as agent of Government of Malaysia would be matters of fact that remained to be tried, tested by cross-examination and established.

[2] It was open to the Court to strike out a claim as disclosing no reasonable cause of action when the facts alleged fell outside the limitation period even though in the defence the statute of limitation in question had not been specifically pleaded.

[3] The power to strike out any pleading is discretionary and should never be lightly applied or invoked save in a plainly unarguable case.

[Defendant's application dismissed with costs of application to plaintiff in any event.]

Cases referred to:
Teo Chee Hing & Ors. v. Government of Sabah [1981] 1 MLJ 207
Riches v. Director of Public Prosecutions [1973] 2 All ER 935

Legislation referred to:
Public Authorities Protection Act 1948, s. 2
Rules of the High Court 1980, O. 33 r. 2

For the applicant/defendant - Muniandy; FC
For the respondent/plaintiff - Ajit Singh Gill; M/s. Vohrah & Tan Chee Lan

JUDGMENT

Peh Swee Chin J:

This is a running-down case in which the plaintiff as administratrix of the estate of one Latchman a/l Sandrial, deceased, claims damages against the defendant who has described himself as "Pte 651359", i.e. a soldier in the army.

Learned Counsel for the defendant applied to strike out the writ and the statement of claim on the ground that the defendant was a servant and/or agent of the Government of Malaysia, the registered owner of the Land Rover which was involved in an accident with the said deceased. The defendant deposed to his being such servant and/or agent.

The plaintiff in her affidavit in reply stated that she had no knowledge of the allegation of the defendant being such servant and/or agent and that such allegations were irrelevant, because the plaintiff's claim was not based on such allegation of the defendant.

A perusal of the statement of claim revealed that the plaintiff had nowhere alleged or claimed that the defendant was such a servant and/or agent.

Learned Counsel's insistence on labelling his client as servant and/or agent of the Government of Malaysia was clearly an attempt, as apparent from subsequent submission before me, to bring this case within s. 2 of the Public Authorities Protection Act, 1948 so as to bar it. Section 2 of the said Act provides:

> 2. Where, after the coming into force of this Act, any suit, action prosecution or other proceeding is commenced in the Federation against any person for any act done in pursuance or execution or intended execution of any written law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority the following provisions shall have effect -
>
> (a) the suit, action, prosecution or proceeding shall not lie or be instituted unless it is commenced within thirty-six months next after the act, neglect or default complained of or, in the case of a continuance of injury or damage, within thirty-six months next after the ceasing thereof;
>
> (b) whenever in any such suit or action a judgment is obtained by the defendant, it shall carry costs to be taxed as between solicitor and client;
>
> (c) where the proceeding is a suit or action for damages, tender of amends before the suit or action was commenced may be pleaded in lieu of or in addition to any other plea;
>
> (d) if the suit or action is commenced after the tender or offer in writing, or is proceeded with after payment into Court of any money in satisfaction of the plaintiff's claim, and the plaintiff does not recover more than the sum tendered, offered or paid, he shall not recover any costs incurred after the tender, offer or payment, and the defendant shall be entitled to costs to be taxed as between solicitor and client as from the time of the tender, offer or payment, and the costs up to the time of such tender, offer or payment shall be in the discretion of the court:
>
> Provided that this provision shall not affect costs on any injunction in the suit or action.

Learned Counsel for plaintiff, among other arguments which need not be repeated here, took a preliminary point on procedure to the effect that the defendant should have pleaded the point of limitation in his defence and then subsequently applied under O. 33 r. 2 of the Rules of the High Court, 1980, for order for the said point to be argued as a preliminary point of law. He complained to the effect this was not done.

The submission on this procedural point can no longer be sustained since the decision of the Federal Court in *Teo Chee Hing & Ors. v. Government of Sabah* [1981] 1 MLJ 207. It used to be the old, frequent practice for a defendant to deliver a defence pleading specifically, the statute of limitation in question, to be followed by a summons for directions for the issue of limitation to be tried. The Federal Court adopted the decision in *Riches v. Director of Public Prosecutions* [1973] 2 All ER 935, where it was held in the latter that it was open to the Court to strike out a statement of claim as disclosing no reasonable cause of action when the facts alleged fell outside the limitation period. Davis L.J. in the case, remarked that he found it difficult to see:

> Why a defendant should be called upon to pay large sums of money ... to pursue a cause of action which has already been barred by the statute of limitation and must fail.

I dismissed the preliminary objection against the application to strike out the statement of claim herein.

Learned Counsel for the plaintiff submitted further that the statement of claim did not mention that or depend on, whether the defendant was such a servant and/or agent of Government of Malaysia; or the vicarious liability against the Government of Malaysia not sued herein.

I could not ignore the force of Counsel's argument just set out above. Whether the defendant was acting in the course of employment as a servant of Government of Malaysia or whether he was acting within the scope of his authority as agent of Government of Malaysia would be matters of facts that remained to be tried, tested by cross-examination and established. Every day, it is not difficult to envisage, Government-owned vehicles are being used by Government servants for purely personal reasons or purposes. Further the power to strike out any pleading is a power the exercise of which involves judicial discretion and should never be lightly applied or invoked save in a plainly unarguable case.

I therefore dismissed the defendant's application with costs of the application to the plaintiff in any event.

Also found at [1985] 2 CLJ 241